ITEM NO. CA7

PUBLIC UTILITY COMMISSION OF OREGON
ADMINISTRATIVE HEARINGS DIVISION REPORT
PUBLIC MEETING DATE: January 25, 2005

REGULAR ____ CONSENT _X_ EFFECTIVE DATE Upon Filing with the Secretary of State

DATE: January 10, 2005

TO: Commissioners Beyer, Savage, and Baum

FROM: Christina Smith and Jodi Skeel

REVIEWED BY: Terry Lambeth, Rules Project Leader

SUBJECT: AR 490: Adoption of an Amendment to OAR 860-016-0050(11).

ADMINISTRATIVE LAW JUDGE RECOMMENDATION:

Adopt a proposed amendment to existing OAR 860-016-0050(11) to conform to ORS 757.455(2), relating to the scheduling of hearings.

DISCUSSION:

In 2002, Legislative Counsel sent a letter to the Commission regarding OAR 860-016-0050, comparing the rule to ORS 759.455. Legislative Counsel noted that ORS 759.455(2)(c) states, "Hearing on the complaint *shall* commence not later than 30 days after the complaint is filed." (Emphasis added.) Subsection (11)(d) of the rule stated, "*If requested*, a hearing shall begin no later than 30 days after the complaint is filed." (Emphasis added.) To conform the rule to the statute , we changed the language of subsection (11)(d) from, "If requested, a hearing shall begin no later than 30 days after the complaint is filed," to "If a party requests a hearing."

In 2004, Legislative Counsel sent another letter. Again, it expressed its concerns that the statute required a hearing but the rule only permitted a hearing when requested. Legislative Counsel suggested striking the language, "If a party requests a hearing." On September 9, 2004, we sent a response to Legislative Counsel indicating that the offending language would be taken out.

To accommodate the realities of case management, the doctrine of waiver will be used. Waiver is the intentional relinquishment of a known right. *State v. Hunter*, 316 Or 192, 199-202 (1993); *Brown v. Portland School Dist*, 291 Or 77, 84 (1981).

The circumstances of each case must be examined to see whether the waiver was intentional. *Hunter*, 316 Or at 201. The court has also looked to see if a party has made a "clear, unequivocal or decisive act showing a purpose to waive" a particular right. *Brown*, 291 Or at 84.

If, at a prehearing conference, the parties do not propose a hearing, which they know they are entitled to under the statute, they may be deemed to have waived the hearing. The parties may also be implied to have waived their right to a hearing if the parties withdraw the complaint or settle the dispute. In each of these situations, the parties must take affirmative action, such as propose a schedule, file a stipulation, or move to withdraw the complaint. While not prejudicing any particular case, each of those actions, could be considered a waiver of the right to a hearing.

On December 20, 2004, Verizon filed comments regarding the proposed rulemaking to adopt changes to OAR 860-016-0050(11)(d). Verizon requested that the amendment not be adopted because in many cases an automatic hearing date will prove unnecessary, and could require extra work in setting and then later withdrawing the hearing date. Verizon believes the change is unnecessary because there are very few interconnection complaints, and those that have arisen are often settled by the parties at or shortly after the filing of the complaint.

Verizon also argues that ORS 759.455 does not require automatically setting a hearing date. Verizon states that according to the statute, a hearing should be "conducted in an expedited manner consistent with" a set of rules set forth in subsections (2)(a)-(c). If the matter is settled at or shortly after the filing of a complaint, no hearing is necessary. Verizon believes that allowing time for the parties to settle would be more constructive. This practice would essentially conform with the practice under the current rule.

In conjunction with the change made to subsection (11)(d), an error was found in subsection (11)(a). The error is minor and can be changed without controversy. The subsection refers to "defendant," but should read "complainant." With the adoption of the above amendment, this correction should also be adopted.

PROPOSED COMMISSION MOTION:

Adopt proposed amendments to OAR 860-016-0050(11) as set forth in Appendix A of the proposed order.

Attachment

ORDER NO. DRAFT

ENTERED

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 490

In the Matter of A Rulemaking to Amend OAR 860-016-0050(11).	)))	 ORDER

DISPOSITION: AMENDMENTS ADOPTED

At its regular public meeting on November 9, 2004, the Public Utility Commission of Oregon (Commission), voted to initiate a rulemaking to amend OAR 860-016-0050(11)(d) to conform with ORS 759.455(2) as suggested by Legislative Counsel. The proposed amendment was published in the Secretary of State's Oregon Bulletin, along with a deadline for comments and requests for hearing.

Verizon Northwest Inc. (Verizon) filed comments on December 20, 2004, arguing against the amendment because an automatic hearing date is often unnecessary and would require extra work in setting and then later withdrawing the hearing date. Verizon did not request a hearing on the matter. The statutory language mandating a hearing appears to indicate a judgment by the legislature that competitive telecommunications carriers' rights to protection from certain prohibited acts by incumbent carriers outweigh the minor inconvenience of an additional filing by the parties. A competitive carrier has a definitive right to a hearing, and it is up to the competitive carrier to waive its right to hearing if it is unnecessary.

In conjunction with the change suggested by Legislative Counsel, the rule shall be changed in two additional respects. First, in subsection (11)(a) the word "defendant" shall be changed to "complainant." Second, changes shall be made to clarify the use of "section" and "subsection" throughout the rule. The changes are not substantive changes.

At its regular public meeting on January 25, 2005, the Commission adopted the recommendation to adopt the proposed amendments. The recommendation is attached as Appendix A and is incorporated by reference.

ORDER

IT IS ORDERED that:

1. Amended OAR 860-016-0050, as found in Appendix A, is adopted.
2. The amended rule shall be effective upon filing with the Secretary of State.

Made, entered, and effective ________________________________.

BY THE COMMISSION:

____

Becky L. Beier
Commission Secretary

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

860-016-0050
Complaints for Enforcement of Interconnection Agreements

(1) Purpose of rule. This rule specifies the procedure for a telecommunications provider, as defined in OAR 860-032-0001, to file a complaint for the enforcement of an interconnection agreement that was previously approved by the Commission. For purposes of this rule, the term "interconnection agreement" is an agreement executed pursuant to the Telecommunications Act of 1996 (the Act). This includes interconnection agreements, resale agreements, agreements for the purchase or lease of unbundled network elements (UNEs), or statements of generally available terms and conditions (SGATs), whether those agreements were entered into through negotiation, mediation, arbitration, or adoption of a prior agreement or portions of prior agreements. S~~ubs~~ection (11) of this rule specifies procedures for complaints alleging that telecommunications utilities have engaged in prohibited acts under ORS 759.455.

(2) The complaint. A complaint for enforcement of an interconnection agreement must contain the following:

(a) A statement of specific facts demonstrating that the complainant telecommunications provider conferred with defendant in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

(b) A copy of a written notice to the defendant telecommunications provider indicating that the complainant intends to file a complaint for enforcement of the interconnection agreement, as described in **sub**section (3)(a) below;

(c) A copy of the interconnection agreement or the portion of the interconnection agreement that the complainant contends was or is being violated. If a copy of the entire interconnection agreement is provided, complainant must specify provisions at issue. If the interconnection agreement adopted a prior agreement or portions of prior agreements, the complaint must also indicate the provisions adopted in those agreements;

(d) A statement of the facts or a statement of the law demonstrating defendant's failure to comply with the agreement and complainant's entitlement to relief. The statement of entitlement to relief must indicate that the remedy sought is consistent with the dispute resolution provisions in the agreement, if any. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits;

(e) The complaint may designate one additional person to receive copies of other pleadings and documents; and

(f) Complainant shall also file with the complaint, as a separate document, any motions for affirmative relief. Motions for injunctive or temporary relief must be clearly marked. Nothing in this subsection shall preclude complainant from filing a motion subsequent to the filing of the complaint if the motion is based upon facts or circumstances unknown or unavailable to complainant at the time the complaint was filed;

(g) Complainant shall also file with the complaint, as a separate document, an executive summary outlining the issues and relief requested. Such summary shall be no more than eight pages.

(3) Service of the complaint. The complaint for enforcement must be served as follows:

(a) At least ten days prior to filing a complaint for enforcement with the Commission, complainant must give written notice to defendant and the Commission that complainant intends to file a complaint for enforcement. The notice must identify the provisions in the agreement that complainant alleges were or are being violated and the specific acts or failure to act that caused or is causing the violation and whether the complainant anticipates requesting temporary or injunctive relief. The notice must be served in the same manner as set forth in subsections (b) and (c) below, except that complainant must also serve the notice on all persons designated in the interconnection agreement to receive notices;

(b) Complainant must serve a copy of the complaint for enforcement on defendant the same day the complaint is filed with the Commission. Service may be by fax or overnight mail, provided the complaint arrives at defendant's location on the same day the complaint is filed with the Commission. Service by fax must be followed by a hard copy the next day in overnight mail; and

(c) Complainant must serve a copy of the complaint for enforcement on defendant's authorized representative, attorney of record, or designated agent for service of process.

(4) The answer**.** An answer must comply with the following:

(a) The answer must contain a statement of specific facts demonstrating that the responding telecommunications provider conferred with complainant in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

(b) The answer must respond to each allegation set forth in the complaint and must set forth all affirmative defenses;

(c) The answer must contain a statement of the facts or a statement of the law supporting defendant's position. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits;

(d) The answer may designate one additional person to receive copies of other pleadings and documents;

(e) Any allegations raised in the complaint and not addressed in the answer are deemed admitted; and

(f) Defendant shall file with the answer, as a separate document, a response to any motion filed by complainant, and any motion defendant wishes to file that seeks affirmative relief. Nothing in this subsection shall preclude defendant from filing a motion subsequent to the filing of the answer if the motion is based upon facts or circumstances unknown or unavailable to defendant at the time the answer was filed.

(5) Service of the answer. The answer must be served as follows:

(a) Defendant must file a copy of the answer with the Commission within ten business days after service of the complaint for enforcement;

(b) Defendant must deliver a copy of the answer to complainant the same day the answer is filed with the Commission, in the manner set forth in **sub**sections (3)(b) and (3)(c) above;

(c) Defendant must serve a copy of the answer on the complainant's attorney, as listed in the complaint, or the person who signed the complaint, if complainant has no attorney.

(6) The reply. Complainant must file a reply to an answer that contains affirmative defenses within five business days after the answer is filed. The reply must be served in the manner set forth in **sub**sections (3)(b) and (3)(c) above. If the reply contains new facts or legal issues not raised in the complaint, the reply must also comply with **sub**section (2)(d) above.

(7) Cross-complaints or counterclaims. A cross-complaint or counterclaim shall be answered within the ten-day time frame allowed for answers to complaints.

(8) Conference. The Commission will conduct a conference regarding each complaint for enforcement of an interconnection agreement.

(a) The Administrative Law Judge (ALJ) will schedule a conference within five business days after the answer is filed, to be held as soon thereafter as is practicable. At the discretion of the ALJ, the conference may be conducted by telephone;

(b) Based on the complaint and the answer, all supporting documents filed by the parties, and the parties' oral statements at the conference, the ALJ will determine whether the issues raised in the complaint can be determined on the pleadings and submissions without further proceedings or whether further proceedings are necessary. If further proceedings are necessary, the ALJ will establish a procedural schedule. The procedural schedule may include a mandatory mediation session. Either party may request that a person other than the ALJ preside over the mediation. Nothing in this subsection is intended to prohibit the bifurcation of issues where appropriate;

(c) In determining whether further proceedings are necessary, the ALJ will consider, but is not limited to, the positions of the parties; the need to clarify evidence through the examination of witnesses; the complexity of the issues; the need for prompt resolution; and the completeness of the information presented;

(d) The ALJ may make oral rulings on the record during the conference on all matters relevant to the conduct of the proceeding.

(9) Discovery. A party may file with the complaint or answer a request for discovery, stating the matters to be inquired into and their relationship to matters directly at issue.

(10) Expedited procedure. When warranted by the facts, the complainant or defendant may file a motion requesting that an expedited procedure be used. The moving party shall file a proposed expedited procedural schedule along with its motion. The ALJ will schedule a conference to be held as soon after the motion is filed as is practicable, to determine whether an expedited schedule is warranted.

(a) The ALJ shall consider whether the issues raised in the complaint or answer involve a risk of imminent, irrevocable harm to a telecommunications provider and to the public interest;

(b) If a determination is made that an expedited procedure is warranted, the ALJ shall establish a procedure that ensures a prompt resolution of the merits of the dispute, consistent with due process and other relevant considerations. The ALJ shall consider, but is not bound by, the moving party’s proposed expedited procedural schedule;

(c) An expedited procedure may be appropriate if the complainant shows that its ability to provide telecommunications services will be substantially harmed unless the Commission acts promptly. In general, the Commission will not entertain a motion for expedited procedure where the dispute solely involves the payment of money.

(11) Procedures for complaints alleging violation of ORS 759.455.

(a) An answer under ~~**sub**~~section (4) of this rule shall be filed with the Commission and served on the ~~defendant~~**complainant** within ten calendar days after service of the complaint;
(b) A reply under ~~**sub**~~section (6) of this rule shall be filed with the Commission and served on the defendant within five calendar days after the answer is filed;
(c) The ALJ shall schedule a conference to be held in person or by telephone not later than 15 calendar days after the complaint is filed;
(d) ~~If a party requests a hearing, a~~ **A** hearing shall begin no later than 30 days after the complaint is filed;
(e) The ALJ may consult with the Commission Staff in the manner set forth in OAR 860-016-0030(6).

Stat. Auth.: ORS Ch. 183 & 756
Stats. Implemented: ORS 756.040, 756.518, 759.030(1), ORS 759.455, Ch. 1093, OR Laws of 1999, & 47 USC § 252
Hist.: PUC 7-1999, f. & ef. 10-18-99 (Order No. 99-631); PUC 7-2000, f. & ef. 5-3-00 (Order No. 00-221); PUC 21-2002, f. & ef. 12-9-02 (Order No. 02-837)